

**U.S. Department of Labor**

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**Issue Date: 05 November 2004**

**Case No.: 2004-LHC-259**

**OWCP No.: 07-167558**

**In the Matter of:**

**JODY J. JOHNSON,**  
Claimant

**vs.**

**C-PORT, L.L.C.,**  
Employer

**and**

**SIGNAL MUTUAL INDEMNITY ASSN., LIMITED,**  
Carrier

**APPEARANCES:**

**SCOTT E. SILBERT, ESQ.,**  
On Behalf of the Claimant

**ANNE KELLER, ESQ.,**  
On Behalf of the Employer/Carrier

**BEFORE: RICHARD D. MILLS**  
Administrative Law Judge

**DECISION AND ORDER – DENYING BENEFITS**

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (the "Act" or "LHWCA"). The claim is brought by Jody J. Johnson, Claimant, against alleged employer C-Port, L.L.C and its carrier Signal Mutual Indemnity Assn., Ltd.,

Respondents. Claimant asserts that he was a direct employee of C-Port when he sustained an injury to his right knee while working as a welder at a C-Port facility. Respondents assert that Claimant was an independent contractor, not an employee, and cannot avail himself of coverage under the LHWCA. A hearing was held on May 7, 2004 in Metairie, Louisiana, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence<sup>1</sup>:

- 1) Joint Exhibit 1;
- 2) Claimant's Exhibits 1-3, 5-10; and
- 3) Respondent's Exhibits Nos. 1-4.

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely, received from both parties. This decision is being rendered after giving full consideration to the entire record.

### **STIPULATIONS**

The Court finds sufficient evidence to support the following stipulations<sup>2</sup>:

- 1) A Notice of Controversion was filed on August 13, 2004.
- 2) An Informal Conference was held on September 3, 2004.

### **ISSUES**

The unresolved issues in these proceedings are:

- (1) Existence of an employer/employee relationship; and
- (2) §904(a) liability; and
- (3) Fact of Injury and Causation; and
- (4) Penalties and attorney fees.

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<sup>1</sup> The following abbreviations will be used in citations to the record: JX – Joint Exhibit; CX – Claimant's Exhibit; RX – Respondent's Exhibit; and TR – Transcript of the proceedings.

<sup>2</sup> JX-1.

## SUMMARY OF THE EVIDENCE

### I. TESTIMONY

#### **Jody J. Johnson**

Mr. Jody Johnson testified that he injured his right knee on June 23, 2003 at the C-Port 2 facility while working as a welder on a slip terminal construction project. On that particular date, Mr. Johnson was installing piping with another welder, Mr. Williams. Mr. Johnson was positioned on a man-lift about thirty five to forty feet off of the ground, and Mr. Williams was controlling the man-lift. The men had previously complained about the safety of this particular man-lift, but it had been checked by C-Port employees and approved for use. The injury occurred when the man-lift jerked while being moved, causing Mr. Johnson to hit his knee against the handrail. His leg began to swell. After attempting to work a few minutes longer, he decided he needed to return to the ground to check his leg. He sat on the back of a truck belonging to Daniel Morris and iced his knee. Mr. Johnson testified that when he determined he could not work any more that day, he brought his invoice to Howie Guidry of ENL Enterprises for a signature and informed him that he was hurt. He telephoned Bruce Kay and told him of his injury and that he had to leave the work site. He also called Mr. Guidry to notify him of the injury. TR 72-75, 100.

That day, Mr. Johnson went to see Dr. Hutchinson, his treating physician. He told Dr. Hutchinson that he had been injured while working on a man-lift. He reported that when he came down from the man-lift, he had to walk through a patch of sand. At this point that he realized he was hurt because he could not walk. Mr. Johnson told Dr. Hutchinson that he was self-employed. At the formal hearing, he explained that he did so because he knew he did not have access to worker's compensation. Eventually, Mr. Johnson saw an orthopedic surgeon, Dr. Terry Habig, who referred him to physical therapy. When his pain did not subside, Dr. Habig recommended surgery. Mr. Johnson testified that he did not have the surgery because he could not afford it. He testified that he would like to have the surgery if he had a way to pay for it. TR 76-78, 92.

Mr. Johnson testified that at the time of his injury, he had been working for C-Port on the slip construction project for two months. Mr. Johnson also testified that he had previously worked for C-Port continuously for one to two years in 1998 or 1999, after which he worked at Martin Terminal until it was bought out by C-Port. Mr. Johnson worked for various other companies as he was needed. He worked a few jobs for C-Port in 2002 and in January and February of 2003. His work with C-Port became more regular in May of 2003. TR 62-63, 94-95.

Mr. Johnson testified that he had not had orthopedic problems with his right knee prior to his accident at C-Port. He stated, however, that his left knee had suffered an injury in February of 2000 when he was roughhousing with friends at a birthday party. He explained that in June of 2000, he injured his left knee further when he fell sideward at work, as an employee at Martin Terminal. He reported this injury to physician, Dr. Hutchinson, but did not make a claim against Martin Terminal for the injury. He testified that he chose not to make a claim because he knew that he had aggravated a previous injury that was not work-related. Surgery was performed on his left knee in 2001. TR 61-62, 81, 86, 88.

Mr. Johnson admitted that when C-Port called him to work, they did not tell him how long the work would last; however, they did tell him that there was a lot of work available. Mr. Johnson considered himself to be a contractor for C-Port. He explained his understanding of the definition of a contractor to be an individual that the company may use periodically as needed, but who is still an employee of the company. He concluded that the set hourly rate the company offers to the contractor is compensation instead of receiving benefits. He testified that C-Port paid him at an hourly rate of \$29.00 per hour. TR 63, 89, 105-106.

During May and June of 2003, Mr. Johnson typically worked a five-day week for C-Port. If he anticipated an absence from work, he felt he had to give notice. He testified that the general understanding was that if you missed two or three days of work in a row, you would not keep the job. However, he admitted that C-Port did not require that he report to a particular supervisor when absent from work. TR 96-98.

Each day on the slip construction project, the welders would generally meet in the shop to receive instructions as to which projects were priorities for completion. A C-Port supervisor would give specifications on how the project was to be completed, such as how to hang and run the pipes. Mr. Johnson was not instructed on how to weld. Mr. Johnson provided his own basic welding tools, while C-Port provided the equipment and materials. On occasion, a C-Port supervisor would send some welders to work on a customer's vessel or to work at another C-Port facility. For instance, Mr. Johnson said that he would occasionally work for C-Port's other business, Clean Tank, or would do work in C-Port's safety department. Mr. Johnson testified that he did not feel like he had the authority to refuse to do the job requested by the C-Port supervisor. TR 64-66, 108-109.

When Mr. Johnson was sent to other jobs, he always billed C-Port 1. His invoices would reflect the billing to C-Port 1, the name of the actual vessel or company facility on which he worked, the job description and the hours. He was paid the same for these jobs as when he worked on the slip construction at C-Port 2. To illustrate Mr. Johnson referenced a ticket that was marked "C-Port for Halliburton; pre-fab walkway and handrails. Go install at Halliburton yard." He explained that a C-Port supervisor had

instructed him to go to the Halliburton facility and had given him instructions on what to do there. He was paid for the work by C-Port. He also referenced a ticket from work done on a vessel where he had re-welded cracks in its foundation. He noted that he had been instructed by a C-Port foreman to complete this work. His C-Port 2 new construction invoices would contain descriptions such as “fit up 10-inch piping and install clamps, double joint, and six-inch.” TR 67-70; CX-10, pp. 10, 11, 15.

Once Mr. Johnson started working on the slip project for C-Port, he did not work for anybody else. He testified that C-Port kept him busy on a daily basis, and he worked fifty to sixty hour weeks. He estimated that he averaged between \$1300 to \$1700 per week, depending on the number of hours worked. TR 64-65, 71.

In addition to his welding duties, Mr. Johnson occasionally had to operate a crane or forklift in order to facilitate his job. He stated that C-Port had employees qualified to operate this equipment, but they were not always available. Mr. Johnson testified that it was his impression that C-Port employs all positions necessary to run a comprehensive offshore facility, including riggers, forklift operators, crane operators, roustabouts, and painters. TR 107-108.

Mr. Johnson testified that prior to his injury he was not told that he had to obtain insurance, and he was not asked for proof of insurance. Mr. Johnson stated that he has worked on jobs in the past that required proof of insurance. In those cases, he would use a contracting company because he could not afford the insurance on his own. He would set up an arrangement between the hiring company and his contracting company. The contracting company would keep a portion of the hourly wage to cover insurance. In this scenario, the hourly rate could range from \$25.00 to \$40.00 TR 63, 71-72.

Mr. Johnson has testified that since the injury, he has done isolated welding work when the job would allow him to sit down. He also worked for a welding contracting company, Masse, for a period of two weeks, but his pain became too great to continue. He testified that he cannot climb ladders, bend down or kneel down and that these restrictions place great limitations on the welding jobs that he is able to do. Mr. Johnson stated that he hopes to resume welding in his previous capacity once he has knee surgery. TR 78-79.

### **Rodney Williams**

Mr. Rodney Williams testified that in June of 2003 he worked as a welder at the C-Port 2 facility on its project to add new terminals to its facility. He worked at an hourly rate of \$29.00 per hour. He testified that Bruce Kay, Brent Guidry and Howard Guidry were C-Port supervisors who instructed the welders as to what tasks needed to be done. The welders were not instructed as to how to weld. C-Port furnished all equipment that was necessary for the job other than his welding machine and his basic tools. The

welders furnished their own rods, torch, and hand tools. Mr. Williams testified that, at times, a C-Port foreman would pull him off of new construction to weld on a vessel that had arrived at a slip. In these instances, he would charge C-Port according to the number of hours he worked on the vessel. C-Port would pay him directly, but would charge the company that owned the vessel an hourly rate ten to twelve dollars above his fee. He wrote on his time tickets that he was a contract welder. TR 17-21, 30, 34-39.

On the morning of June 23, 2003, Mr. Williams was working with Mr. Johnson at C-Port 2 installing diesel lines at the slips. Mr. Williams was operating the man-lift, and Mr. Johnson was in the basket. Mr. Williams testified that as he moved the basket to the side, it jerked and Mr. Johnson's weight shifted causing him to fall against the handrail. Mr. Johnson asked to be brought down and proceeded to sit down on the back of the truck. Mr. Williams testified that when Mr. Johnson's pain did not improve, he left the job site. TR 25-27.

Mr. Williams testified that he had reported the man-lift dangerous to C-Port three times before the accident. He also testified that C-Port had sent someone to repair it the afternoon before the accident and that C-Port removed the machine from the premises after Mr. Johnson's accident. He testified that approximately one hour after the accident, Bruce Kay commented to him that he empathized with Mr. Johnson for going home because he knew the pain of a knee injury. Mr. Williams said that he had been working with Mr. Johnson for three months, and Mr. Johnson had never complained about leg pain nor appeared to have physical problems with his leg. TR 26-29, 32-33.

Mr. Williams did not recall if he had entered into a written contract with C-Port prior to Mr. Johnson's injury. However, he did recall that after the injury, he was asked to sign a written contract that included an insurance clause requiring five million dollar coverage. He discussed the contract with Clarence Triche, a C-Port employee, who told him that the paper was only a formality and that he did not need to obtain the required insurance. Mr. Triche allowed him to scratch out the clause, and Mr. Williams wrote on the contract, "I have no insurance." Mr. Williams testified that other employers have required him to show proof of insurance. In such an event, he would purchase the insurance himself and show proof to the employer before he was allowed to work. TR 21-24.

Mr. Williams testified that at the time he was working for C-Port, he was free to work for another entity. However, C-Port kept him busy with work. Mr. Williams testified that at C-Port he earned weekly wages ranging from \$1300.00 to \$1700.00. He testified that he currently makes \$37.00 per hour with a different company. He testified that the average wage for a welder is \$28.00 per hour. TR 25, 30-31, 33, 37.

## **Daniel Morris**

Mr. Daniel Morris testified that he is a welder/fitter at C-Port and had maintained that position for approximately six years. He described himself as a contract welder that works on an as-needed basis. He testified that C-Port does not withhold taxes from his paycheck, issue a W-2 or 1099 tax form, or provide health insurance. TR 40, 50.

Mr. Morris testified that he worked on the new slip construction project in June of 2003. The welders were provided a visual template to reference, and James Guidry and Clarence Triche instructed the welders on how many feet of pipe to run and what materials to use. They were not told how to weld, and they provided their own basic welding equipment. He said that the welders were scheduled to work a five-day week and that he typically worked fifty to fifty-five hours per week at a rate of \$29.00 per hour. He stated that he did not have a written contract with C-Port for his welding work in the summer of 2003. TR 40-41, 53.

Mr. Morris testified that situations would arise where a C-Port supervisor would ask him and other welders to weld on a vessel or a different job. He said he had the right to refuse, but the expectation was that if you refused, you would forfeit your job. If it rained, a C-Port supervisor would direct the welders either to stay indoors, perform an indoors job, or go home. Welders had the right to sell their services elsewhere, but this typically did not happen because there was an understanding that there would be work for them at C-Port every day. At the time of Mr. Johnson's accident, Mr. Morris had been working continuously on this project for C-Port for six to eight months. He had previously worked two continuous years for C-Port doing slip construction and other large projects. Mr. Morris testified that he made an average of \$1,350.00 per week. He testified that Jody Johnson and Rodney Williams worked nearly the same hours as him. However, they were more frequently pulled from slip construction to work on vessels, which would give them more hours. TR 41-44, 54.

After Jody Johnson's accident, Mr. Morris was asked to sign a contract stating that he had insurance. Mr. Morris testified that he did not actually obtain the insurance because Clarence Triche told him it was not necessary. Mr. Morris has worked at past jobs that required proof of insurance. In those cases, he would obtain his insurance by working through another welding company, Masse, which provided the requisite insurance. Working through Masse, he was paid \$25.00 per hour. Masse collected six to seven dollars above the \$25.00 per hour to cover the insurance. TR 45-46.

On June 23, 2003, the day of Jody Johnson's accident, Mr. Morris testified that as he was approaching the job site, he saw the man-lift being lowered to the ground. He said that Mr. Johnson was limping as he approached and said he had twisted his knee on the man-lift. Mr. Morris helped Mr. Johnson to his tailgate and put ice on his knee. Mr. Morris worked out of the same man-lift after the accident. TR 47-48.

When Bruce Kay approached the men, Mr. Morris told him that Mr. Johnson had twisted his knee, but that he thought it was an old injury. Mr. Morris thought that Mr. Johnson had re-hurt his old injury on the other knee. Mr. Kay commented that he understood how it was to have a knee injury. Mr. Morris said that he had been working with Mr. Johnson for weeks, and Mr. Johnson had never complained about leg pain and had never appeared to have physical problems. Mr. Morris is related to Mr. Johnson and is still employed at C-Port. TR 48-49.

Mr. Morris testified that due to his long-standing relationship with C-Port, he would be one of the last welders cut if work became scarce. Mr. Morris testified that Mr. Williams was also a regular contractor with C-Port, of a similar status as him. Mr. Morris was not certain as to the regularity of Mr. Johnson's work with C-Port, but had not seen him on a day-to-day basis from January to June of 2003. He testified that during May and June of 2003, C-Port kept Mr. Johnson just as busy as Mr. Morris and Mr. Williams. TR 57-60.

### **James Guidry**

Mr. James Guidry is employed by C-Port as an Assistant Manager. He is in charge of operations of C-Port personnel, equipment and customers. He testified that C-Port is a multi-facet entity that supports deep-water drilling for the Gulf of Mexico by providing facilities where customers load their crew boats to take supplies offshore. He testified that C-Port employs crane operators, forklift operators, roustabouts, and dispatchers. None of the employees are capable of welding. C-Port's direct employees are paid at an hourly rate by punching a time-clock. They are paid overtime, taxes are withheld from their paychecks, and they are provided with benefits. TR 118-120.

Mr. Guidry stated that welding services are required for new construction and when customers need welding done on their vessels. C-Port's policy is to call a contract welder when a customer asks for welding services. C-Port tries to use a contract welder who is already onsite, if possible. C-Port maintains a list of welders who can be contacted for jobs, and they are called to a job in order of preference depending on their skills. Mr. Guidry testified that Mr. Williams and Mr. Morris rank high on the list. When a welder is called, he is told the particular job that is available, but is not told how



long the job will last. Welders are paid at an hourly rate, taxes are not withheld, and they are not provided benefits. The welders record their time on invoices, which are signed by Howie Guidry, Brent Guidry, or Bruce Kay. Invoices are to be submitted once a week on Monday. TR 120-123.

Prior to 1999, contract welders were not required to sign any documentation. However, beginning in 1999, contract welders were required to sign an indemnity agreement. Mr. Guidry testified that he and Clarence Triche were responsible for obtaining all of the contractors' signatures. TR 124-125.

Mr. Guidry testified that welders are told the project on which to work and receive no other information. C-Port provides equipment to facilitate welding, such as cranes or forklifts, but does not provide actual welding tools. Mr. Guidry testified that welders are sometimes pulled from new construction to work on a customer's vessel and that C-Port charges the customers an additional fee in excess of the welder's hourly rate. Contract welders are free to work for other entities and are allowed to return to C-Port afterwards. They are not required to give notice if they do not show up to work. As opposed to C-Port's regular employees, no disciplinary action is taken for absences and no personnel files are kept on contract welders. TR 125-128.

Mr. Guidry testified that he did not recall having a communication with Mr. Johnson about a knee problem on June 23, 2003. He recalled speaking with Mr. Johnson a few days later about his knee injury. He testified that he told Mr. Johnson to come back to work when he felt better. Mr. Guidry testified that Mr. Johnson did not mention being hurt on a man-lift or that the injury was work-related, but told him that it was an old injury. Mr. Guidry testified that a few days following the previous conversation, Mr. Johnson contacted him inquiring how to use C-Port's worker's compensation to get surgery. Mr. Guidry informed Mr. Johnson that he would check. They did not have any further communication. TR 128-130, 132.

Mr. Guidry explained that C-Port's protocol in the event of a work injury is to get in touch with an immediate supervisor. There is a twenty-four hour onsite paramedic who next assesses the problem and fills out an accident report. This process applies to contract welders as well as other employees. TR 130-131.

On cross examination, Mr. Guidry testified that when welders were contacted for the new construction project, it was indicated that the project would last a long time and that there was plenty of work available. He admitted that the welders were kept busy basically every day, but on an as-needed basis. He acknowledged that by characterizing the welders as independent contractors, the company avoided withholding taxes, providing benefits, paying overtime and paying unemployment. TR 133-136.

Mr. Guidry testified that prior to Mr. Johnson's accident, contract welders were not required to show proof of insurance. After the accident, Mr. Guidry was simply told to get signatures on the indemnity agreements, but was never told to enforce them. TR 137.

Mr. Guidry testified if a contract welder were to make a mistake on a customer's ship, C-Port would have to cover the losses. He testified that a contract welder that habitually did not show up for work would find himself at the bottom of the call list. He agreed that, effectively, the welders that are available more often and who are diligent about reporting to work are placed at the top of the list. TR 138-139.

### **Bruce Kay**

Mr. Bruce Kay is employed by Edison Chouest Offshore and has worked with them for fourteen years. In June of 2003, he was sent to oversee the construction of the slips that were being built at C-Port. He was responsible for tasking the subcontractors and keeping the project on schedule. He would instruct welders where to go on a certain day so as to ensure their work did not interfere with any other subcontractors. TR 141-142.

On June 23, 2003, Mr. Kay recalled seeing Mr. Johnson sitting on the back of a truck with an ice pack on his knee. Mr. Kay recalled that upon asking Mr. Johnson what was wrong, Mr. Johnson replied that he had a problem with his knee and that it flared if he stepped on it wrong. Mr. Kay testified that he responded by saying "That's a shame." He testified that Mr. Johnson did not mention injuring his knee on the man-lift and that the conversation lasted less than one minute. When Mr. Kay passed by the area later, another welder told him that Mr. Johnson had gone home. TR 142-143, 145-146.

On cross examination, Mr. Kay acknowledged that it is within his control to point out an insufficient type of weld to a contract welder. He also said he had not noticed Mr. Johnson having any physical difficulties prior to the accident. TR 145, 147.

## **II. MEDICAL EVIDENCE: Reports**

### **Dr. Troy Hutchinson, M.D.**

Dr. Hutchinson saw Mr. Johnson on the day of his injury, June 23, 2003. He complained of right knee pain and swelling. Dr. Hutchinson's notes reflect that Mr. Johnson said he was injured while working that morning and had twisted his knee while walking through sand. Dr. Hutchinson noted that Mr. Johnson was self-employed. Dr. Hutchinson prescribed medication and compresses and ordered x-rays and ultrasounds. Mr. Johnson returned on June 26, 2003 with similar complaints. An MRI was performed. Dr. Hutchinson referred Mr. Johnson to an orthopedist. He next saw Mr. Johnson on

April 29, 2004. His notes reflect that Mr. Johnson was in mild distress and complained of continuing right knee pain. An MRI revealed a degeneration of the right medial meniscus. CX-2, pp. 2-5.

In addition, Mr. Johnson's medical chart shows that he visited Dr. Hutchinson in April of 2000, complaining of knee pain radiating down his leg. The chart does not specify which knee. The chart also shows a visit in June of 2000 concerning left lower leg pain and injury. Mr. Johnson's medical records for June 12, 2000 show that Dr. Hutchinson wrote that Mr. Johnson fell while at work with sideways type injury to knee. He wrote that Mr. Johnson "works as a welder—free contractor." CX-2, p. 1.

### **Dr. Terry L. Habig, M.D.**

Dr. Terry L. Habig first saw Mr. Johnson on July 28, 2003. Mr. Johnson was referred to Dr. Habig by his attorney. Dr. Habig's notes indicate that Mr. Johnson injured his right knee while at work on June 26, 2003. Dr. Habig's notes reflect that Mr. Johnson was caught in equipment when he hit his right knee and sustained a twisting injury to the knee. He had seen his family physician who had run a venous ultrasound, which came up negative for DVT. Mr. Johnson complained of pain in his right knee when standing, walking, or bending his knees. He had been unable to work due to the pain. He denied any previous history of injury to the right knee or calf. One of the MRI's suggested a possible torn meniscus, although the radiologist felt that it was probably past intrameniscal degeneration. Dr. Habig recommended physical therapy and opined that Mr. Johnson was unable to return to work as a welder at that time. CX-1, pp.5-7.

Dr. Habig next saw Mr. Johnson on August 25, 2003 and found that his range of motion had improved. He found that Mr. Johnson's symptoms and physical findings could be consistent with a torn meniscus. Operative and non-operative treatments were discussed. CX-1, pp. 3-4.

On his September 23, 2003 visit, Mr. Johnson complained of continuing pain in the right knee. Dr. Habig found no significant change in his condition and prescribed Lodine 400 mg b.i.d. PC. He noted that Mr. Johnson could return to work if his pain allowed him to do so. CX-1, pp. 1-2.

### **Dr. Vega, M. D.**

The record contains medical notes from Dr. Vega. However, there is no evidence as to Dr. Vega's specialty or qualifications. The note dated July of 2003 shows that Mr. Johnson complained of right knee pain and muscle spasms. The note dated February 18, 2004 shows that Mr. Johnson complained of right knee pain and right hamstring pain. CX-5.

### **III. OTHER EVIDENCE**

#### **Invoices and Pay Stubs**

Claimant has submitted various invoices containing a company name, job description, number of hours worked, and the amount he was paid. The invoices evidence that Mr. Johnson worked consistently on new construction for C-Port 2 from May 1, 2003 through June 23, 2003. During this time period there were seven separate days where his invoices reflect that he was pulled from the C-Port 2 project to work on a customer's vessel for C-Port 1. The hours billed on the invoices reflect that Mr. Johnson was working a full-time work week for C-Port during this time period. CX-10.

The collective pay stubs submitted by Claimant and Respondent show that prior to May of 2003, he worked for various entities, often several in one month. These entities include Clean Tank, L.L.C., Gulf Tran Shipyard, Inc., C-Port, L.L.C, Allison Marine-Fourchon, L.L.C., Rainbow Marine, C-Port 2 and Masse Contracting. The pay stubs reflect that Mr. Johnson began working for C-Port 2 on May 1, 2003 and worked through June 26, 2003 at an average weekly wage between \$1,000.00 and \$1,500.00.

Subsequent to his accident, Mr. Johnson did a small amount of work for C-Port 2 in July of 2003 that amounted to a paycheck of \$174.00. His pay stubs evidence that he performed various work through Masse Contracting and independent work at Gulf Tran and Allison Marine from September of 2003 through March of 2004. Respondent submitted pay stubs totaling \$16,918.84 from September through December of 2003 and \$16,207.20 from January to April of 2004. CX-8; RX-2; RX-3.

#### **Tax Returns**

Mr. Johnson's paid self-employment tax for Jody's Welding Service on his 1997, 1998, 1999 and 2000 federal income tax returns. On his 2001 federal income tax, he paid self-employment tax for Big Johnson's Welding Service. RX-4.

#### **Contractor/Subcontractor Master Indemnity Agreement**

The indemnity agreement between Big Johnson's Welding and C-Port, L.L.C. is signed by Jody Johnson and Clarence Triche; however, it is not dated. Article I provides that a subcontractor must execute the agreement and provide verification of insurance for inspection by C-Port before commencement of work. Article II provides that the subcontractor works as an independent contractor. Article VII lists the minimum

insurance requirements for subcontractors, including worker's compensation. Article VIII requires that prior to entry onto the premises of C-Port, the subcontractor must produce a written and enforceable specific endorsement of a general liability insurance policy and a worker's compensation insurance policy designating C-Port as an alternate and statutory employer. RX-1.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 2d 221 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221.

### **RELATIVE NATURE OF THE WORK TEST**

The existence of an employer-employee relationship is a condition precedent to establishing subject matter jurisdiction under the LHWCA. Holmes v. Seafood Specialist Boat Works, 14 BRBS 141, 147 (1981). The United States Court of Appeals for the Fifth Circuit has held that the proper test for determining whether a claimant is an employee or an independent contractor is the "relative nature of the work" test. Haynie v. Tideland Welding Service, 631 F.2d 1242, 12 BRBS 689(5<sup>th</sup> Cir. 1980); Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, 625 F.2d 1248, 14 BRBS 356 (5<sup>th</sup> Cir. 1980). The test requires examining the nature of a claimant's work and the relation of that work to the alleged employer's regular business. Oilfield Safety, 625 F.2d at 1253, 14 BRBS at 359. The court explained:

In evaluating the character of a claimant's work, a court should focus on various factors, including the skill required to do the work, the degree to which the work constitutes a separate calling or enterprise, and the extent to which the work might be expected to carry its own accident burden. [citation omitted]. In analyzing the relationship of the claimant's work to the employer's business the factors to be examined include, among others, whether the claimant's work is a regular part of the employer's regular work, whether the claimant's work is continuous or intermittent, and

whether the duration of [the] claimant's work is sufficient to amount to the hiring of continuing services as distinguished from the contracting for the completion of a particular job. Id.

Applying the "relative nature of the work" test to this case, the Court finds that Mr. Johnson was not an employee of C-Port. To evaluate the nature of Mr. Johnson's work, the Court first considers the skill required to do the work. Mr. Johnson performed work as a welder, an occupation that is specialized and requires expertise. Mr. Johnson, Mr. Williams, and Mr. Morris testified that they were instructed by C-Port supervisors as to the specifications of the project and the daily site location, but they were not instructed as to how to weld. See TR 19, 30, 53, 64, 108-109. C-Port relied on the welders' judgment and expertise to carry out the welding tasks as necessary to comply with the specifications. In this respect, the Court finds that the nature of Mr. Johnson's work for C-Port was specialized.

The Court next considers the degree to which Mr. Johnson's work constituted a separate calling or enterprise. The Court finds that Mr. Johnson's welding service was his own separate enterprise. Mr. Johnson's income tax filings of 1997 through 2001 indicate that he maintained a sole proprietorship welding service in his name. He paid self-employment taxes each year. See RX-4. He owned his own welding equipment that he used on each job. See TR 65. Mr. Johnson invoiced his services under his own name or the name "Big Johnson's Welding Services," rather than using a time card. See CX-10; RX-2. C-Port did not withhold taxes from Mr. Johnson's paychecks, and Mr. Johnson acknowledged that the set hourly rate of \$29.00 per hour was compensation that took the place of benefits. See TR 89. The nature of Claimant's welding work was that he was free to work for any entity of his choosing. See TR 127. Unlike C-Port direct employees, he did not have to give notice if he would be absent from work. He was not paid for days that he did not work. See TR 98. Based on these considerations, the Court finds that Mr. Johnson's welding work was a separate calling or enterprise.

The last consideration in evaluating the nature of Mr. Johnson's work is the extent to which the work might be expected to carry its own accident burden. Claimant and Respondent have presented conflicting evidence regarding this issue. The record contains an undated indemnity agreement signed by both Mr. Johnson and Clarence Triche, a C-Port representative. See RX-1. The agreement contains a clause requiring that Mr. Johnson provide verification of insurance coverage before commencing work at C-Port. See RX-1. The insurance clause was never enforced by C-Port, and Mr. Johnson was allowed to work without insurance. See TR 137. Mr. Johnson's testimony revealed that when an employer required insurance coverage, his practice was to make an arrangement through Masse Contracting to obtain the necessary coverage. See TR 71-72. The Court can only conclude that Mr. Johnson's failure to make such an arrangement in this situation is a direct result of C-Port's failure to enforce the insurance requirement. Mr. Williams and Mr. Morris's testimony cast further doubt on the seriousness of C-

Port's insurance requirement. Both Mr. Williams and Mr. Morris were not asked to sign an indemnity agreement until after Mr. Johnson's accident. Even then, they were told that insurance was not actually required. See TR 21-22, 44-45. Mr. Williams even wrote "I have no insurance" on his document. See TR 23. Mr. Guidry himself testified that he was instructed only to obtain signatures on the agreement, not to enforce the insurance clause. See TR 137. Further, the absence of a date on the indemnity agreement does not allow the Court to consider the timeliness of this agreement to the circumstances surrounding the current case. The expectation of whether Mr. Johnson's work was to carry his own accident burden is further complicated by evidence of Mr. Johnson's own doubt as to whether he could access worker's compensation benefits. His medical records reflect that he told Dr. Hutchinson that he was self-employed, and he explained at the hearing that he classified himself as such because he knew he was not covered by worker's compensation. See TR 92. Based on the conflicting evidence, the Court will not make a specific determination as to the extent Mr. Johnson's work was expected to carry its own accident burden. As this factor is one of many, the Court is still capable of making an ultimate decision in its absence.

Analyzing the relationship of the claimant's work to the employer's business requires that the Court first consider whether Mr. Johnson's work is a regular part of C-Port's work. The Court finds that Mr. Johnson's work is not a part of C-Port's regular work. C-Port's regular business is providing a facility where crew boats can load supplies to facilitate deep water drilling in the Gulf of Mexico. See TR 119. Mr. Guidry testified that C-Port uses contract welders for construction and to repair customer's vessels. See TR 120. Construction projects are not a regular part of C-Port's business because they will end upon completion of the structure. Regardless of whether C-Port had been constructing facilities since 1999, as indicated by Mr. Morris, Mr. Johnson's work was only on a new phase of construction that did not begin until 2003. See TR 133. Mr. Guidry testified that C-Port facilitates their customers' requests for repairs by providing a welder when necessary. See TR 126. Mr. Johnson's pay stubs reflect that of the two months that he worked for C-Port, there were only seven occasions on which he completed customer repairs. See CX-10. Repair work did not take place of such a frequency that it amounted to the regular work of C-Port.

The second factor the Court must consider is whether Mr. Johnson's work with C-Port was continuous or intermittent. For two months, May and July of 2003, Mr. Johnson worked full work weeks for C-Port. See CX-10. While his work during this two month period was continuous, Mr. Johnson's work history as a whole is not indicative of continuous regular work with C-Port. In the periods before and after his injury, Mr. Johnson worked for a variety of entities, including C-Port, as an independent contractor. See CX-10; RX-2; RX-3. The Court finds that Mr. Johnson's work on a particular phase of construction for a two month period is intermittent in reference to his work history as a whole.

The last factor the Court must consider in analyzing the relationship of the claimant's work to the employer's business is whether the duration of the claimant's work is sufficient to amount to the hiring of continuing services as distinguished from the contracting for the completion of a particular job of finite duration. The Court finds that Mr. Johnson was contacted by C-Port for the completion of a specific project. Mr. Guidry testified that Mr. Johnson was asked to work on a new phase of construction; however, he did not specify the duration of the construction project. See TR 122. In contrast, Mr. Johnson testified that he was simply told that plenty of work was available at C-Port on a daily basis. See TR 105-106. The Court finds that Mr. Johnson had knowledge that he was working primarily on a construction project for C-Port, given that welding on slip construction comprised the majority of his work on the premises. Although C-Port did not specify the actual duration of the construction project, the duration was finite in that it would end once construction was completed. The fact that work was available daily on this specific project does not amount to a hiring of continuing services. The Court finds apparent that work would be made available on a daily basis only until the construction was completed.

The Court finds that under the "relative nature of the work" test, Mr. Johnson was an independent contractor given the specialized nature of his work and his established separate enterprise as a welder. His welding work for C-Port was not a regular part of C-Port's business, was not continuous and was work required for a particular phase of construction. For the foregoing reasons, the Court finds that Mr. Johnson was not an employee of C-Port at the time of his injury. The Court also clarifies that the argument raised by Claimant that, in the alternative, he was a "borrowed employee" is null as Mr. Johnson was clearly self-employed, a situation in which the "borrowed employee" doctrine is not applicable.

#### **SECTION 904(a)**

Section 904(a) provides:

Every employer shall be liable for and shall secure the payment to his employees of compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation.

The Fifth Circuit has held that a §904(a) relationship includes a "two contract" requirement in which "a general employer will be held secondarily liable for worker's compensation when the injured employee was engaged in work either that is a subcontracted fraction of a large project or that is normally conducted by the general



employer's own employees rather than by independent contractual obligations.” Sketoe v. Exxon Co., U.S.A., 188 F.3d 596, 33 BRBS 151 (CRT) (5<sup>th</sup> Cir. 1999).

The Court finds that §904(a) is inapplicable to the present case. The Court has found Mr. Johnson to be a self-employed independent contractor who has no employer. Therefore, Mr. Johnson does not fall within the coverage of §904(a), because he is not employed by a subcontractor. Further, the “two contract” requirement cannot be met because C-Port did not owe any contractual obligation to another entity that included work being performed by Mr. Johnson. C-Port was the owner of the facility and hired independent contractors to perform the welding on its own property. In the absence of a “two contract” requirement, a §904(a) relationship cannot be established and the Claimant cannot avail himself of the protection of §904(a).

Accordingly,

## **ORDER**

It is hereby **ORDERED, ADJUDGED AND DECREED** that Claimant's claim for benefits is **DENIED**.

**So ORDERED.**

**A**

**RICHARD D. MILLS**  
Administrative Law Judge